FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. NAGESH SHETTY, *Defendant-Appellant.*	No. 96-50583 D.C. No. CR-94-00119-GLT OPINION

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Argued and Submitted
August 6, 1997—Pasadena, California

Filed November 20, 1997

Before: Cynthia Holcomb Hall and Thomas G. Nelson,
Circuit Judges, and B. Lynn Winmill,* District Judge.

Opinion by Judge Nelson

SUMMARY

Criminal Law and Procedure/Sentencing

The court of appeals affirmed a judgment of conviction and sentence. The court held that under the Sentencing Guidelines, a tax-fraud defendant's transfer of money offshore dur-

*Honorable B. Lynn Winmill, United States District Judge for the District of Idaho, sitting by designation.

ing an IRS criminal investigation constitutes an obstruction of justice.

After conducting a civil audit of appellant Nagesh Shetty's income-tax returns for 1987 through 1989, the IRS notified him that it was conducting a criminal investigation. Less than three weeks later, Shetty's wife transferred $280,000 to a Swiss bank account.

An indictment charged Shetty with subscribing to false tax returns. Shetty's initial appearance was on December 7, 1994; arraignment was on December 12; the scheduled trial date was January 31, 1995.

Before the January 9, 1995 status conference, there were eight continuances, six of which were based on Shetty's request or a joint request of the parties. On May 22, 1995, the district court granted a continuance of the trial that had been set for June 6. On June 12, the parties filed a stipulation specifying excludable time under the Speedy Trial Act (STA). On that basis and a finding that the ends of justice would be served, the court entered an order on June 13 continuing the trial to October 3, the first available date.

During a September 11 status conference, the district court ruled on defense discovery motions. The court advised counsel that the trial set for October 3 would have to trail for one or two weeks due to unavoidable delays. Pursuant to a stipulation, the court continued the trial to November 28.

About two weeks prior to a rescheduled April 16, 1996 trial date, the government moved to depose a witness who was scheduled for major surgery on April 11. Again pursuant to stipulation, the district court continued the trial to June 11. Defense counsel twice stated that there were no objections to the delay.

Ten days before trial and 540 days after his initial appearance, Shetty moved to dismiss the indictment under the STA.

The district court denied the motion, citing the various continuances by stipulation and Shetty's failure to object to or withdraw them.

At trial, the government used the net worth method to establish Shetty's unreported income. Shetty was convicted. At sentencing, the district court imposed an enhancement for obstruction of justice based on the cash transfer to the Swiss bank account. Shetty appealed.

[1] Pursuant to the STA, a defendant must be brought to trial within 70 days of the filing date of the indictment, or from the date of his initial appearance before a judicial officer, whichever is later. The district court may exclude delays caused by a continuance based on findings that the ends of justice served by it outweigh the best interests of the public and the defendant in a speedy trial.

[2] While it is true that court congestion cannot serve as a basis for a continuance, where a trial date is set and later changed at the request of the parties, district courts cannot be required to reset cases in unworkable or unavailable time slots. There was no indication that the defense requested an earlier date or withdrew its stipulation to continue the trial to October 3, 1995. The district court had no reason to reset the trial on an earlier date.

[3] Until September 11, 1995, the defense did not know the outcome of its discovery motions. To call a jury, let alone call witnesses, takes time. Had the court unexpectedly moved the trial date from October 3 to September 11, counsel would no doubt have argued that they were prejudiced and needed more time to prepare. [4] Under the circumstances, the ends of justice served by the continuance to October 3 outweighed the best interests of the public and the defendant in an earlier trial date.

[5] Shetty and his counsel stipulated to the facts underlying the district court's findings of excludable time, and at no time

did they attempt to withdraw the stipulation and/or request an earlier date between October 3 and November 28. There was no violation of the STA.

[6] Even when given two opportunities to object to a continuance of the trial on June 10, 1996, the defense voiced no objection and represented that the unavailability of a witness provided grounds for a finding of excludable time. At no time did the defense attempt to withdraw its stipulation or request an earlier trial date.

[7] Given the totality of the record related to each continuance, there was no violation of the STA. [8] Had Shetty or his counsel not agreed with any of the circumstances supporting the continuances, or the length of any continuance, it was incumbent upon Shetty and his counsel to refrain from signing the stipulations and to advise the court by objection or otherwise.

[9] It is the responsibility of defense counsel, the government, and the district court to take affirmative steps to protect a defendant's right to a trial under the STA. Shetty's motion to dismiss was not filed until at least 540 days after his initial appearance and only 10 days before he went to trial. Defense counsel may not simultaneously use the STA as a sword and a shield.

[10] Use of the net worth method is proper where a taxpayer's records do not accurately reflect income. [11] The net worth method may be used if the government accurately establishes the taxpayer's opening net worth, identifies a likely source of income from which it may be inferred that the increase in net worth arose, and conducts a reasonable investigation of leads that suggest that the taxpayer properly reported income.

[12] There was ample demonstration by the government that Shetty's records were unavailable and inadequate. During

the civil audit Shetty did not provide the IRS with his books and records. During the criminal investigation, defense counsel refused to provide any information regarding Shetty's books and records. Shetty admitted that he did not keep certain records, and his former receptionist testified that she never maintained a variety of records. From a practical standpoint, it was a lack of records that led to the criminal investigation.

[13] There was nothing to suggest that there were any records that accurately reflected Shetty's income. Had the government pursued Shetty further, defense counsel would surely have argued that the prosecution was attempting to deprive Shetty of his Fifth Amendment privilege against self-incrimination.

[14] The government was not required to show the exact amount of the deficiency. It was merely required to show a false statement on Shetty's returns. If anything, Shetty benefited from the use of the net worth method at sentencing. [15] The figures the government showed as unreported income were conservative. [16] Any contention that Shetty's records accurately reflected his income verged on the frivolous.

[17] The fact that the government eventually learned of the $280,000 did not change the fact that Shetty's transfer of the funds to a Swiss bank was a classic attempt to conceal evidence material to an official investigation. [18] In a tax case, money is material evidence.

COUNSEL

Kimberly A. Dunne, Assistant United States Attorney, Los Angeles, California, for the plaintiff-appellee.

Alan M. Dershowitz, Dershowitz & Eiger, Cambridge, Massachusetts, for the defendant-appellant.

OPINION

T.G. NELSON, Circuit Judge:

Nagesh Shetty was convicted of subscribing to false tax returns in violation of 26 U.S.C. § 7206(1) for the 1987, 1988 and 1989 tax years. Because Shetty's trial began 551 days after his initial appearance, he contends the Speedy Trial Act, 18 U.S.C. §§ 3161-3174, was violated. Shetty seeks reversal of his conviction and dismissal of the indictment.

In the alternative, Shetty challenges the Government's use of the "net worth method" to determine his taxable income during the trial and for purposes of sentencing. He also challenges the district court's enhancement of his sentence under Section 3C1.1, United States sentencing guidelines, for "obstructing or impeding the administration of justice" based on his wife's transfer of $280,000 to a Swiss bank account. Shetty requests that his sentence be vacated and that his case be remanded for resentencing.

We affirm Shetty's conviction and sentence.

FACTS AND PRIOR PROCEEDINGS

Nagesh Shetty, a cardiologist who came to the United States from India in 1973 and became a naturalized citizen in 1978, practices medicine in Southern California. Beginning in 1980, Shetty went to H & R Block for assistance in filing joint tax returns with his wife. The same H & R Block preparer assisted Shetty from 1980 to 1992.

In 1990, Shetty's 1987 and 1988 tax returns were selected for an audit by the IRS. The audit was later expanded to include 1989, and when the revenue agent performing the audit suspected that Shetty had fraudulently filed false tax returns, the IRS commenced a criminal investigation. The investigation revealed that Shetty was the sole supporter of

his wife and four children and that he was in charge of the finances in his home and at his office. Although Shetty reported gross receipts of $357,220 in 1987, $356,249 in 1988, and $431,894 in 1989, he reported a taxable income of $15,687 in 1987, a *negative* taxable income of -$3,025 in 1988, and a taxable income of $2,064 in 1989. During that same time period Shetty lived in a nice home, purchased a second home as an investment, bought two new cars, including a Mercedes, and amassed a substantial savings.

In its case, the Government claimed Shetty perpetrated his tax fraud by concealing income from his H & R Block tax preparer when he (1) omitted income from seven insurance carriers, and (2) misrepresented that he accepted insurance payments as payment in full and that he received no payments directly from patients. Shetty made similar misrepresentations to the IRS agent who conducted the audit of his 1987, 1988 and 1989 tax returns. In addition, he (1) claimed that he had amassed substantial savings by borrowing on credit lines, and (2) denied that he had purchased any property in 1988, until the agent confronted him with evidence of his purchase of a second home.

It was on December 3, 1991, that Shetty was notified that the IRS's civil audit was being converted to a criminal tax investigation. Less than three weeks after Shetty learned of the criminal tax investigation, his wife transferred $280,000 to a Swiss bank account.

After Shetty was indicted on three counts of subscribing to false tax returns in violation of 26 U.S.C. § 7201(a), he entered a plea of not guilty at his initial appearance on December 7, 1994. Due to a number of continuances, all of which were supported by stipulations of fact signed by the Government, defense counsel, and Shetty himself, the case did not go to trial until June 11, 1996.

Ten days prior to trial, Shetty filed a motion to dismiss the indictment claiming a violation of the Speedy Trial Act. The

day before the trial began, the district court heard argument on the motion and orally denied it. Two days later, the court filed a twelve-page order which detailed its reasons for the denial. The court also denied Shetty's motion to reconsider.

Following a two-week trial, a jury convicted Shetty on all three counts. Thereafter, the district court sentenced Shetty to twenty-one months' imprisonment, a $40,000 fine, and ordered him released on bond pending resolution of this appeal.

DISCUSSION

I. *The Speedy Trial Act*

A. *The Standard of Review*

We review legal questions regarding the application of the Speedy Trial Act *de novo*, and factual findings for clear error. *United States v. Contreras*, 63 F.3d 852, 854-55 (9th Cir. 1995); *United States v. Aviles-Alvarez*, 868 F.2d 1108, 1111 (9th Cir. 1989).

B. *The Act in General and as Applied by the District Court*

[1] Pursuant to the Speedy Trial Act, a defendant must be brought to trial within seventy days of the filing date of the indictment, or from the date of his appearance before a judicial officer, whichever is later. *See* 18 U.S.C. § 3161(c)(1). The Act sets forth several types of "excludable delay," which do not count toward the seventy-day limit. 18 U.S.C. §§ 3161(h)(1)-(8). For example, the district court may exclude delays caused by a continuance if the continuance is based on findings that the ends of justice served by the continuance outweigh the best interests of the public and the defendant in a speedy trial. *See* 18 U.S.C. § 3161(h)(8)(A).

In this case, Shetty made his initial appearance on December 7, 1994; was arraigned on December 12, 1994; and his trial was set for January 31, 1995. From December 7, 1994, until January 9, 1995, at which time the district court held a status conference, thirty-three days elapsed under the Speedy Trial Act. Thereafter, there were eight continuances of the trial. Shetty on his own or in conjunction with the Government requested six of these continuances. As of the hearing on Shetty's motion to dismiss, which was heard the day before his case went to trial, the Government submitted that "61 days . . . [had] passed on the speedy trial clock [and that] . . . nine days remain[ed]." Tr. at 47 (June 10, 1996).

On June 12, 1996, the district court filed a twelve-page order detailing its reasons for denying Shetty's motion to dismiss under the Speedy Trial Act, which read in part:

> [Shetty] stipulated to the findings required by this Court in determining excludable time [under 18 U.S.C. § 3161(h)(8)(A)]. Based upon the parties [sic] representations, the Court made findings that this time should be excluded under the Act.

Order Den. Def.'s Mot. to Dismiss Indictment, at 9 (June 12, 1996) (footnote omitted).

> It is important to note that while eighteen months have elapsed from [Shetty's] arraignment to his trial date, approximately 283 days of this period are directly attributable to [Shetty's] requests. Therefore, over half of the delay involved in this matter is neither at issue, nor disputed by [Shetty] in his motion.

Id. at 10 n.9.

> As mentioned before, [a defendant] cannot waive the right to a speedy trial. However, at the same time, [a defendant] may not stipulate to certain findings and

> then later seek to attack a court's findings concerning excludable time based upon such stipulations. [Shetty] always stipulated to the continuances, never once challenging the Government's position or the Court's reasoning.

Id. at 12 (citations and footnote omitted).

C. *The Act as "Used" by the Defense*

In an effort to muster nine more days of nonexcludable time from the record to establish a violation of the Speedy Trial Act and obtain a reversal of his conviction, Shetty focuses on three of the six continuances to which he stipulated.

1. *Continuance from June 6 to October 3, 1995.*

Following an informal status conference on May 22, 1995, the court granted a continuance of the trial which had been set to commence on June 6. On June 12, 1995, the parties filed a "Stipulation and Order Re[:] Excludable Time Under the Speedy Trial Act," and pursuant to that stipulation, the court subsequently entered an order on June 13, 1995, which continued the trial to October 3. Also by stipulation of the parties, the order entered by the court expressly found:

> [T]he ends of justice served by granting the requested continuance outweigh the best interests of the public and the defendant in a speedy trial, in that the failure to grant the continuance would deny the government continuity of counsel, and would deny newly associated defense counsel a reasonable period of time to adequately prepare for trial.

Order Re[:] Excludable Time Under the Speedy Trial Act, filed June 13, 1995, ¶4 at 2. Shetty makes a variety of argu-

ments related to this continuance, but we discuss only the two primary arguments emphasized on appeal.[1]

First, to substantiate his position that the trial was delayed due to court congestion, Shetty emphasizes that the district court's order expressly states that "[t]he court's next available trial date is October 3, 1995." *Id.* ¶3, at 1.

[2] This argument does not establish a violation of the Speedy Trial Act. We note that the order entered by the district court was *drafted* and *proposed* by the parties themselves and submitted with their stipulation. And, while it is true that court congestion cannot serve as a basis for a continuance, *United States v. Engstrom*, 7 F.3d 1423, 1427 (9th Cir. 1993), where a trial date is set and later changed at the request of the parties, district courts certainly cannot be required to reset cases in unworkable or "unavailable" time slots. Moreover, there is no indication in the record that the defense ever requested an earlier trial date or that it withdrew its stipulation to continue the trial to October 3, 1995. Absent notice that the defendant was withdrawing from the stipulation or requesting an earlier trial date, the district court had no reason to reset the trial on an earlier date.

In his second major argument related to this continuance, Shetty points out that on September 11, 1995, a status conference was held during which the district court ruled upon discovery motions filed by the defense. Contending that the time between September 11 and October 3, 1995, should not be excludable, Shetty essentially maintains that once the discovery motions were ruled upon, it was incumbent on the trial

[1]In view of the entire record, we find either that Shetty's other arguments have been adequately addressed by the district court's Order Denying Defendant's Motion to Dismiss the Indictment, filed June 12, 1996, and its Minute Order filed July 1, 1996 (incorporating Government's Opposition to Defendant's Motion to Reconsider, filed June 24, 1996); or that those arguments are unsupported by any authority and warrant no discussion.

court to disregard the earlier stipulation of the parties, as well as its own order, and reset the trial on a date earlier than October 3, 1995. More specifically, in his opening brief, Shetty states that "[t]here is no indication that counsel, who were both available for the conference, were unable to proceed on September 11th. The trial could have been scheduled for that date." (Brief of Appellant at 30.)

[3] In hindsight and for purposes of arguing that the Speedy Trial Act was violated, the defense contends it was ready to try the case on September 11. This argument, if successful, might earn Shetty extra days of nonexcludable time under the Speedy Trial Act, but it completely discounts the realities associated with prosecuting, defending and conducting a criminal trial. Until September 11, 1995, the defense did not know the outcome of its discovery motions. Moreover, to call a jury, let alone witnesses, takes time. Had the court unexpectedly moved the trial date up from October 3 to September 11, 1995, counsel for both sides would likely have argued that they were being prejudiced and needed more time to prepare.

[4] Under the circumstances, "the ends of justice served by the continuance [to the scheduled trial date of October 3, 1995] outweigh[ed] the best interest of the public and the defendant in [an earlier trial date]." 18 U.S.C. § 3161(h)(8)(A). In addition, there is no indication in the record that the defense withdrew its earlier stipulation to continue the trial until October 3, 1995, and/or requested an earlier trial date at any time following the outcome of the September 11 hearing and before the scheduled trial date of October 3, 1995. Absent notice that the defense was withdrawing from the stipulation or wanted an earlier trial date, the district court had no reason to reschedule Shetty's trial on an earlier date.

2. *Continuance from October 3 to November 28, 1995.*

When the district court advised counsel that the trial set on October 3 would have to trail another trial for one to two

weeks, leading to a variety of unavoidable delays, such as the unavailability of counsel and essential witnesses, the Government and Shetty jointly sought a continuance in a "Stipulation and Order Re[:] Continuance of Trial Date and Excludable Time Under the Speedy Trial Act." Subsequently, and pursuant to the stipulation of the parties, the district court entered an order continuing the trial.

[5] Now, on appeal, the defense would like to go back and attribute the entire continuance to "calendar congestion" and treat the *entire* period as nonexcludable under the Speedy Trial Act. This argument once again ignores the fact that both Shetty and his counsel stipulated to the facts underlying the district court's findings of excludable time, and at no time, either orally or in writing, did they attempt to withdraw their stipulation and/or request an earlier trial date between October 3 and November 28. Therefore, based on the totality of the record before us, we find no violation of the Act with respect to this continuance.

3. *Continuance from April 16 to June 11, 1996.*

Pursuant to a "Stipulation Re: Continuance of Trial Date, Excludable Time Under the Speedy Trial Act, and Disclosure of Jury Panel" (RE 105-09), the district court continued the trial from April 16 to June 11, 1996. (RE 110-12.) This continuance receives the most attention from Shetty.

Approximately two weeks prior to the April 16 trial date, the Government requested that a deposition be taken of Connie Hansen, a witness who was scheduled for major surgery on April 11, 1996, for which she would require six to eight weeks of recuperation. Hansen had worked in Shetty's office and he did not want to give up his right to confront her in front of a jury. During the hearing on the motion to take Hansen's deposition, defense counsel specifically said, "*I'd be remiss if I didn't, on behalf of my client, request a continuance of the trial until that witness is available.*" Tr. at 6 (April

4, 1996) (emphasis added). And, although the Government indicated it was willing to proceed to trial without Hansen, it *also* indicated that it would "*absolutely*" like to have her testify. *Id.* at 14-15 (emphasis added).

Ultimately, the district court determined that the trial should be continued. The court specifically asked: "Okay. I gather from what I am hearing that there is no defense objection to putting it over to June, correct?" *Id.* at 30. Both defense counsel answered: "Correct." *Id.* at 31. In addition, defense counsel further stated:

> I did speak with [the AUSA] off the record, and for purposes of Speedy Trial Act. I am prepared to enter into a stipulation on behalf of the defendant, and the defendant and [co-defense counsel] will also sign the stipulation to the effect that there is excludable time based on the unavailability of that particular witness, and that would be from the date of the proposed surgery, if I'm not mistaken . . . to the date of trial including her recovery period as well.

Id.

Then, during the same hearing, when issues related to the selection of a new jury panel and the compilation of audit information arose, the AUSA requested an additional six weeks continuance. And, as to that request, the district court specifically inquired: "Does the defense counsel disagree with any of the grounds [for the continuance] that counsel has stated?" *Id.* at 41. Defense counsel responded: "No, your honor." *Id.*

[6] Despite Shetty's arguments that he was not the moving force behind the granting of the continuance or that Connie Hansen was neither an unavailable nor an essential witness, we find no violation of the Speedy Trial Act. We reject these arguments largely because even when given two direct oppor-

tunities to object to a continuance of the trial, the defense voiced no objection and affirmatively represented that the unavailability of a particular witness provided grounds for a finding of excludable time. In addition, we reject Shetty's arguments based upon the following items in the record: the "Stipulation Re[:] Continuance of Trial Date, Excludable Time Under the Speedy Trial Act, and Disclosure of Jury Panel" filed by the parties on April 19, 1996; the district court's corresponding order filed April 23, 1996; the Order Denying Defendant's Motion to Dismiss the Indictment, filed June 12, 1996; and the Minute Order filed July 1, 1996 (incorporating the Government's Opposition to Defendant's Motion to Reconsider, filed June 24, 1996). Finally, we note that after Shetty and his counsel stipulated to the facts underlying the district court's findings of excludable time, at no time, either orally or in writing, did the defense attempt to withdraw its stipulation or request a trial date earlier than June 10, 1996.

D. *The Record Demonstrates No Violation of the Act*

The defense relies heavily on *United States v. Clymer*, 25 F.3d 824 (9th Cir. 1994), a Speedy Trial case in which this court remanded with instructions for the district court to dismiss an indictment with prejudice. However, any reliance on *Clymer* is misplaced because critical facts distinguish it from Shetty's case. In *Clymer*, the district court failed to make findings of excludable time. *Id.* at 828-29. *Clymer* also presented the unusual situation in which a 522-day trial delay could not be said to have "resulted from" the pendency of a motion to dismiss because the district court had rescheduled consideration of the motion until after it had heard evidence at trial. *Id.* at 830-31. In addition, unlike the defendant in *Clymer* who was in custody during the entire 522-day period, *see id.* at 827 n.3, Shetty was not in custody while awaiting his trial.

To justify dismissal of the indictment with prejudice, Shetty (1) emphasizes the nature of his offense and that the Government can pursue civil remedies to collect what is

owed, (2) points to the 551-day delay between his initial appearance and trial date, and (3) blames the district court for having "repeated disregard for the speedy trial mandate."

[7] Given the totality of the record related to each continuance challenged by Shetty, we find no violation of the Speedy Trial Act. Here, the record made by the district court can hardly be considered an example of "repeated disregard for the speedy trial mandate." On the contrary, as it relied upon separate stipulations containing undisputed facts to support each continuance at issue, the district court sufficiently tied the length of each continuance to its reasons for granting each continuance. And, though technically not called for by the excludable time provisions under 18 U.S.C. § 3161(h)(8)(A), the district court "went the extra mile" by requesting the parties to submit stipulations which specifically reflected that they agreed upon the factual circumstances supporting each continuance.

[8] Had Shetty or his counsel not agreed with *any* of the factual circumstances supporting the continuances or the length of any continuance, it was *incumbent upon Shetty and his counsel* to refrain from signing the stipulations and to advise the court by objection or otherwise. For instance, had Shetty or his counsel objected to the length of any continuance at issue on appeal, there is nothing to suggest that the case could not have been tried at an earlier date or that the case would not have been reassigned to another judge for purposes of conducting the trial at an earlier date.

As clearly demonstrated by the record, however, the defense never objected to any of the continuances, even when the district court gave it direct opportunities to do so. Instead, Shetty personally stipulated to six of the eight continuances (and each of the three continuances upon which he focuses on appeal). As a cardiologist, Shetty is obviously well educated. The provisions of the Speedy Trial Act were not hidden in fine print in the stipulations which he, along with his counsel,

personally signed. In fact, the title of each stipulation expressly referred to "Excludable Time Under the Speedy Trial Act."

In light of those stipulations, and in the absence of any objection by the defense, it is inappropriate for Shetty to seek reversal of his conviction under the Speedy Trial Act and dismissal of the indictment, with or without prejudice. *Cf. United States v. Palomba*, 31 F.3d 1456, 1462 (9th Cir. 1994) (where defendant stipulates to the need for trial preparation, he cannot maintain that continuances give rise to a violation of the Speedy Trial Act). Each continuance at issue in Shetty's case was specifically supported by the district court's reference to facts, which were stipulated by the parties, and which buttressed each of its findings of excludable time under the Speedy Trial Act. *Cf. United States v. Jordan*, 915 F.2d 563, 566 (9th Cir. 1990) (reversing and remanding for determination on issue of dismissal of indictment with or without prejudice under 18 U.S.C. § 3162(a)(2), where Speedy Trial Act was violated because district court failed to limit the time of continuances and to make specific findings referring to facts underlying each continuance). Here, each continuance at issue was specifically limited in time (i.e., by the setting of another trial date). *Id.*

Though Shetty does not claim a violation of his Sixth Amendment right to a speedy trial, we find it worth noting that the factors considered in that context include: "(1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and (4) the *prejudice to the defendant.*" *United States v. Baker*, 10 F.3d 1374, 1401 (9th Cir. 1993) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)) (emphasis added). Here, the record—in addition to demonstrating reasonable delays and the lack of any objection by Shetty regarding such delays—lacks any showing of prejudice to Shetty. *See Clymer*, 25 F.3d at 832 (where defendant showed actual prejudice by loss of evidence, loss of the abil-

ity to prepare for trial, and loss of liberty which resulted from open-ended continuances during his incarceration).

[9] Finally, in *Aviles-Alvarez*, 868 F.2d 1108, this court recognized that: "[I]t is the responsibility of *defense counsel*, the government, and the district court to take affirmative steps to protect a defendant's right to a trial" under the Speedy Trial Act. *Id.* at 1113 (emphasis added). In discharging that responsibility, defense counsel cannot wait until the eve of trial to assert a Speedy Trial Act violation. *Cf. United States v. Berberian*, 851 F.2d 236, 239 (9th Cir. 1988) ("[A] defendant who seeks dismissal cannot wait until trial to assert a Speedy Trial Act violation."). Here, defense counsel emphasizes that Shetty's trial did not take place until 551 days after Shetty's initial appearance. However, Shetty's motion to dismiss under the Speedy Trial Act was not filed until June 1, 1996, at least 540 days after Shetty's initial appearance and only ten days before he finally went to trial. Although Shetty's motion technically came prior to trial and preserved his right to raise this issue on appeal under 18 U.S.C. § 3162(a)(2), we note the timing of the motion. As aptly recognized by the district court: "Defense counsel may not simultaneously use the Act as a sword and a shield." Order Den. Def.'s Mot. to Dismiss Indictment, at 13 (quoting *United States v. Pringle*, 751 F.2d 419, 434 (1st Cir. 1984)). We agree. And, given the record before us, we will not sanction the use of the Speedy Trial Act as a "sandbag," held for 540 days and then thrown at the district court ten days before trial.

In summary, the district court did not err when it denied Shetty's motion to dismiss the indictment under the Speedy Trial Act, given that Shetty never objected to any continuance and that he personally, and through counsel, stipulated to the facts underlying each of the district court's findings of excludable time pursuant to 18 U.S.C. § 3161(h)(8)(A). Therefore, because the district court's factual findings were not clearly erroneous, and its findings of excludable time are

fully supported by the record before us, we affirm Shetty's conviction.

II. *The "Net Worth Method"*

A. *Standard of Review*

Shetty contends that the use of the net worth method of determining unreported income was improper during his trial and at sentencing.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *United States v. Manning*, 56 F.3d 1188, 1196 (9th Cir. 1995). Where a party does not object to the use of evidence at the time of trial, however, we review for plain error. Fed. R. Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 731-32 (1993).

A district court's evaluation of the reliability of evidence used for sentencing purposes is reviewed for an abuse of discretion. *United States v. Ponce*, 51 F.3d 820, 828 (9th Cir. 1995).

B. *The Net Worth Method in General*

[10] Use of the net worth method is proper where a taxpayer's records do not accurately reflect income. *United States v. Stonehill*, 702 F.2d 1288, 1296 (9th Cir. 1983).

> The net worth method seeks to derive taxable income in any given year by determining from all available evidence of assets and liabilities the increase (or decrease) in [a] taxpayer's net worth over a twelve-month period, adding to it his nondeductible expenses for that year, and subtracting from the sum any amount attributable to nontaxable sources. For example, if a taxpayer begins the year with a net worth (cost of property less liabili-

> ties) of $40,000, ends it with $50,000, and has spent $7,500 during the year on living expenses, his receipts must have been at least $17,500. And if there is no likely nontaxable sources of funds, such as gifts or inheritances, this set of facts constitutes strong circumstantial evidence that the receipts were taxable income.

United States v. Colacurcio, 514 F.2d 1, 2 n.2 (9th Cir. 1975) (quoting *McGarry v. United States*, 388 F.2d 862, 864 (1st Cir. 1967)).

[11] The net worth method was approved by the Supreme Court in *Holland v. United States*, 348 U.S. 121, 130-39 (1954), and has been recognized in this circuit on numerous occasions. *United States v. Greene*, 698 F.2d 1364, 1370 (9th Cir. 1983). The net worth method of establishing income may be used if the Government (1) accurately establishes the taxpayer's opening net worth, (2) identifies a likely source of income from which it may be inferred that the taxpayer's increase in net worth arose, and (3) conducts a reasonable investigation of any leads that suggest that the taxpayer properly reported his income. *Id.* (citing *Holland*, 348 U.S. at 132-38).

C. *As Used in Shetty's Trial and Sentencing*

In proving that Shetty subscribed to false tax returns in violation of 26 U.S.C. § 7206(1), the Government used the net worth method of proof to determine the amount of income Shetty failed to report on his tax returns. The defense did not object to the use of this evidence at trial.

Nevertheless, on appeal, Shetty contends that use of the net worth method was improper at trial and for purposes of sentencing because the Government made "*no* effort" to obtain his financial records. The defense argues that the Government was required to demonstrate that "it has made efforts to obtain

the taxpayer's books and records but they [were] either unavailable or inadequate." These arguments misstate and ignore critical facts in the record.

[12] First, there is ample demonstration by the Government that Shetty's records were unavailable *and* inadequate. For example, during the civil audit and despite repeated requests, Shetty did not provide the IRS with his books and records. Then, during the criminal investigation, defense counsel refused to provide any information regarding Shetty's books and records to the IRS special agent. Shetty admitted that he did not keep certain records typical of a medical practice, and his former receptionist testified that she never maintained a variety of records. Due to the unavailability and inadequacy of Shetty's records, the IRS agent stated that it was not possible to track down every payment from insurance companies or directly received from patients during the tax years at issue. From a practical standpoint, it was the lack of records which led to the criminal investigation in the first place.

[13] Furthermore, although the defense argues that the Government should have used its subpoena/summons power and made more direct contacts with Shetty to compel him to turn over his records, there is absolutely nothing to suggest that there were any records in existence which accurately reflected Shetty's income. Had the Government pursued Shetty further, defense counsel would surely be arguing that the prosecution was attempting to deprive Shetty of his Fifth Amendment privilege against self-incrimination. *Cf. United States v. Helina*, 549 F.2d 713, 715-16 (9th Cir. 1977) (taxpayer charged with tax evasion and subscribing to false tax return refused to produce books and records during criminal investigation and Government was forced to use the net worth method).

[14] In this case Shetty was charged only with subscribing to false tax returns. Thus, technically, the Government was not required to show the exact amount of tax deficiency at

trial. Instead, it was merely required to show a false statement on Shetty's returns. Although Shetty challenges the use of the net worth method during the trial, on appeal he does not ask for a new trial based on the admission of that evidence. The only relief sought in relation to the net worth method is a remand for resentencing which, in view of the record, seems surprising. If anything, Shetty benefited from the use of the net worth method at sentencing.

[15] The figures which the Government showed as unreported taxable income for the tax years at issue were "*conservative.*" Tr. at 28 (Oct. 11, 1996) (emphasis added). For example, the Government did not consider living expenses for Shetty, his wife, and their four children. *See Colacurcio*, 514 F.2d at 2 n.2 (living expenses typically considered when net worth method used to determine taxable income).

Also at sentencing, the district court considered Shetty's challenge to the use of the net worth method stating:

> The Court is satisfied that the evidence in this case was very likely the *tip of the iceberg*. That's the way in which the case was presented. It was presented on the matters, the cold, hard, easy to show and obvious items. There are indications to the Court that the figure may be well in excess of $120,000, but I don't think the Court needs to decide that at this point. The only issue to decide is whether the amount of tax loss exceeds $120,000 and the Court finds that it does. I think there is very clear evidence to the Court that that's the case.

Tr. at 50-51 (Oct. 11, 1996).

[16] Given the entire record, any contention that Shetty's business and personal records accurately reflected his income verges on frivolous. *Cf. Stonehill*, 702 F.2d at 1296 (where

taxpayers caused millions of unrecorded dollars to be deposited in Swiss bank accounts, any contention that their tax records accurately reflected income was "frivolous"). Therefore, allowing the use of the net worth method during the course of Shetty's trial was not plain error, and using it for purposes of sentencing was a proper exercise of the district court's discretion.

III. *The Obstruction/Impeding Justice Enhancement*

A. *Standard of Review*

A district court's factual determinations under Section 3C1.1 of the guidelines are reviewed for clear error, and a district court's characterization of a defendant's conduct as obstruction within the meaning of Section 3C1.1 is reviewed de novo. *United States v. Ford*, 989 F.2d 347, 351 (9th Cir. 1993).

B. *The Section 3C1.1 Enhancement in General*

Section 3C1.1 of the guidelines is entitled "Obstructing or Impeding the Administration of Justice" and states: "If the defendant willfully obstructed or impeded, or attempted to obstruct or impede the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels." U.S.S.G. § 3C1.1 (Nov. 1, 1990).

As the Commentary to Section 3C1.1 acknowledges, "[o]bstructive conduct can vary widely in nature, degree of planning, and seriousness." U.S.S.G. § 3C1.1, comment. (n.2). The "non-exhaustive list of examples of the types of conduct to which this enhancement applies" includes "destroying or *concealing* or *directing or procuring another person* to destroy or *conceal* evidence that is material to an official investigation or judicial proceeding . . . ." *Id.* at n.3(d) (emphasis added).

C. *Application of the Enhancement to Shetty's Sentence*

On appeal, Shetty essentially takes two positions regarding the enhancement. First, he contends that since the Government "demonstrated that the $280,000 existed during the taxable years in question and relied on the $280,000 in establishing [his] net worth," the Government was "unable to demonstrate how the movement of the money in December 1991 obstructed its investigation or prosecution." (Reply Brief of Appellant, at 21 and 22.) Secondly, Shetty contends that the district court improperly "departed upward"—without any notice in the PSR or at any time prior to sentencing—to the extent it based the enhancement on a finding that the transfer of funds in December 1991 concealed his ability to pay a fine at the time of sentencing in October 1996. Despite these arguments, we do not find a remand for resentencing warranted.

For a district court to apply this enhancement, the guidelines only require a finding of an "*attempt*[ ] to obstruct or [impede], the administration of justice *during the investigation*, prosecution, *or* sentencing of the instant offense." U.S.S.G. § 3C1.1 (emphasis added).

The following time frames evidence Shetty's attempts to conceal the $280,000 once he learned of the IRS's civil audit, and later, after he learned of the criminal investigation. Shetty was initially informed by a letter dated June 20, 1990, that his tax returns were being audited. On June 29 and July 2, 1990, a total of $280,000 was withdrawn from savings accounts and made payable to Shetty's wife in four cashier's checks. The checks were not negotiated and became stale in September 1991 when a single check in the amount of $280,000 was reissued. On December 3, 1991, Shetty was notified of the criminal tax investigation; on December 23, 1991, the $280,000 cashier's check was voided; and on December 24, 1991, the funds were wired by Shetty's wife[2] to a bank in Switzerland.

[2]It is undisputed that the bank accounts were in Shetty's wife's name, but he was named as the trustee on the accounts, and all of the money came from his medical practice because his wife did not have any source of income.

[17] The foregoing time frames can hardly be considered coincidental. The fact that the Government eventually learned of the $280,000 does not change the fact that Shetty's transfer of the funds to a Swiss bank was a "classic attempt" to "*conceal evidence . . . material to an official investigation.*" U.S.S.G. § 3C1.1, comment. (n.3(d)) (emphasis added). As it applied the obstruction enhancement at Shetty's sentencing hearing, the district court observed:

> The Court takes notice of the facts in this case, and it's very clear what was going on here. This money was being transferred out before it was closed in on in some way. I think it was very apparent that that's the case. And whether it was—I think that the conduct had many possible benefits, as the defendant saw it. The potential fine in this case is not a nominal amount, and we see the defendant appearing today to argue that he just doesn't have the ability to pay a fine. And that argument would have been very hard to make had he had $280,000 sitting in the bank. So I think it's quite clear that that's an obstruction.
>
> What I have described as fairly commonplace in today's world is the person who puts the money offshore so that they can get access to it later and others can't, just in case. It's walking-around money, just in case somebody finds himself in some strange new place or has to take some other kinds of action. For that reason, it's an obstruction of justice, in my view.
>
> The transfer of it . . . was an obstruction of justice, if you look at it in terms of the transmitting of evidence or the taking away of evidence, the presence of which could have helped the government's case . . . .

Tr. at 51-52 (Oct. 11, 1996). App. 25

Of course, had the fine issue been the district court's only basis for the enhancement, and had the defendant not had any notice of that basis, a remand might be appropriate. However, the mere mention of the $280,000 in relation to Shetty's ability to pay a fine does not warrant a remand. On the contrary, the record on appeal demonstrates that the district court had ample bases for making the reasonable inference that Shetty "attempted to obstruct or impede the administration of justice."

[18] In addition to the statements made at the hearing itself, the district court's "statement of reasons" attached to the judgment and commitment order filed October 18, 1996, adopted the factual findings and guideline application from the presentence report which detailed the nature of the charged offenses, i.e., "subscribing to false tax returns," and the *timing* of the transfer of $280,000 to Switzerland—three weeks after Shetty learned of the criminal investigation. Moreover, on appeal, Shetty concedes that the "$280,000 existed during the taxable years in question." In light of that concession, one must conclude that Shetty's attempt to conceal $280,000 in a Swiss bank account was, at the very least, an "attempt" to conceal "evidence . . . material to an official investigation" of his tax returns for 1987, 1988 and 1989. U.S.S.G. § 3C1.1, comment. (n.3(d)). And, as simply stated by the Government: "[I]n a tax case, money is material evidence."

We find the district court's factual determinations under Section 3C1.1 of the guidelines were not clearly erroneous, and that the characterization of Shetty's conduct as an obstruction within the meaning of Section 3C1.1 was correct as a matter of law.

AFFIRMED. App. 26

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
FEB - 3 1998
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES OF AMERICA,	)	No. 96-50583
Plaintiff-Appellee,	)	D.C.No.CR-94-119-GLT
v.	)	ORDER
NAGESH SHETTY,	)	
Defendant-Appellant.	)	

Before: HALL and T.G. NELSON, Circuit Judges, and WINMILL,* District Judge.

The panel has voted to deny appellant's petition for rehearing. Judge Nelson votes to reject the suggestion for rehearing en banc and Judges Hall and Winmill so recommend.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

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*Honorable B. Lynn Winmill, United States District Judge for the District of Idaho, sitting by designation.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FILED
JUN 12 1996
Clerk, U.S. District Court
Central District of California
Southern Division at Santa Ana
By Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	Case No. SACV 94-119 GLT
Plaintiff,	ORDER DENYING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT
vs.	
NAGESH SHETTY,	
Defendant.	

Defendant's motion to dismiss the indictment for violation of the Speedy Trial Act is DENIED.

Speedy Trial Act

Congress enacted the Speedy Trial Act of 1974, 18 U.S.C. § 3161 et. seq., (the "Act"), in order to strengthen the speedy trial right secured by the Sixth Amendment. United States v. Mehrmanesh, 652 F.2d 766, 769 (9th Cir. 1981). The Act requires a trial "commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. § 3161(c)(1). If the defendant is not brought to trial within the time limits set by the Act, the

indictment "shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2).

Section 3161(h) of the Act specifies appropriate situations in which time is excluded from calculating the required seventy day period. Delay resulting from the filing of a pretrial motion is automatically excluded. 18 U.S.C. § 3161(h)(1)(F). Delay resulting from the "absence or unavailability of the defendant or an essential witness" is also to be excluded. 18 U.S.C. § 3161(h)(3)(A). Furthermore,

> Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

18 U.S.C. § 3161(h)(8)(A). If a court finds the "ends of justice" are best served through a continuance, the delay caused by a continuance is excludable only if court sets forth in the record of the case, either orally or in writing, its reasons for finding that the ends of justice are served through the grant of a continuance. 18 U.S.C. § 3161(h)(8)(A).[1]

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[1] In determining whether to grant a continuance pursuant to section 3161(h)(8)(A), a judge shall consider the following factors (among others):

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of act or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrests occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which tne grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of

The Ninth Circuit has held that the "'ends of justice' exclusions were intended by Congress to be 'rarely used.'" United States v. Jordan, 915 F.2d 563, 565 (9th Cir. 1990) (citation omitted). "[T]he provision is 'not a general exclusion for every delay.'" Id. (citation omitted). The continuance must be granted based on "specific factual circumstances." Id. (citation omitted). The Speedy Trial Act requires the "continuance be specifically limited in time and that there be findings supported by the record to justify each 'ends of justice' continuance." Jordan, 915 F.2d at 565; see United States v. Clymer, 25 F.3d 824, 828 (9th Cir. 1994) (citing Jordan).

Last, the Act specifically prohibits the grant of excludable continuances due to the "general congestion of the court's calendar." 18 U.S.C. § 3161(h)(8)(C).

Chronology of the Case

The parties are in agreement that the speedy trial clock began running the day after December 7, 1994, when Defendant was arraigned before a judicial officer.[2] See United States v. Vasser, 916 F.2d 624 (11th Cir. 1990) (date on which defendant is arraigned is excludable).

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due diligence.

18 U.S.C. § 3161(h)(8)(B).

[2] Having been released on bond, Defendant has spent no time in the Government's custody while awaiting trial.

1. December 7, 1994 to January 9, 1995

The parties agree that from Defendant's arraignment on December 7, 1994 to the first status conference on January 9, 1995, 33 days elapsed under the Speedy Trial Act.

2. January 9, 1995 to February 9, 1995

At the status conference on January 9, 1995, Defendant requested a continuance to obtain counsel. The Court granted Defendant's request and entered an order excluding the time from January 9, 1995 to February 9, 1995, because the ends of justice served by the continuance "outweigh the best interests of the public and the defendant in a speedy trial, in that the failure to grant the continuance would deny defendant a reasonable period of time to retain counsel." January 11, 1995 Order ¶ 4. Defendant does not challenge the Court's finding of excludable time for this period. Motion at 5:17-19.

3. February 9, 1995 to June 6, 1995

At the second status conference on February 9, 1995, Defendant's counsel sought a continuance of the trial date in order to have adequate time to prepare. The Court granted Defendant's request to postpone the trial date to June 6, 1995, because to deny the continuance would deny defendant continuity of counsel and a reasonable of time to prepare the case for trial." February 10, 1995 Order ¶ 1. The Court held the time period from February 9, 1995 to June 6, 1995 excludable under the Act. Id. ¶ 2. Defendant does not

challenge the exclusion of this time period. Motion at 6:1-2.

4. June 6, 1995 to October 3, 1995

On May 22, 1995, Government counsel sought a continuance of the trial date due to illness. The Court then issued a minute order granting the Government's request for a continuance to September 11, 1995, "in light of government counsel's illness, and without objection by defendant." May 22, 1995 Minute Order. On June 12, 1995, the parties filed a stipulation stating, "the ends of justice served by a continuance outweigh the best interest of the public and the defendant in a speedy trial in that the continuance will allow the government continuity of counsel, and newly associated defense counsel adequate time to prepare for trial." June 12, 1995 Stipulation ¶ 3. On June 13, 1995, the Court entered its Order stating the same. June 13, 1995 Order ¶ 4. Furthermore, the Court also noted that the Court's next available trial date was October 3, 1995. Id. ¶ 3. Based upon its findings, the Court continued the trial until October 3, 1995. Id. ¶ 5.

Defendant disputes the Court's finding of excludable time on two separate grounds. First, Defendant notes that the Government, and not the Defendant, sought the continuance. This may be true, but under the Speedy Trial Act the Court may exclude time to ensure defendant or the Government continuity of counsel. 18 U.S.C. § 3161(h)(8)(B)(iv). Second, Defendant contends the length of the delay was attributable to the Court's calendar. While it is true the Court's findings mention the next available trial date, the continuance was "at most only indirectly

attributable to the court's scheduling problems." United States v. Gallardo, 773 F.2d 1496, 1505-06 (9th Cir. 1985). The basis of the Court's ruling was to guarantee Government continuity of counsel and to allow newly associated defense counsel a reasonable period of time to prepare adequately for trial.[3] June 13, 1995 Order ¶ 4.[4]

5. October 3, 1995 to November 28, 1995

On September 11, 1995, the parties appeared before the Court for a status conference and hearing on Defendant's

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[3] Defendant cites United States v. Frey, 735 F.2d 350 (9th Cir. 1984), for the proposition that even a request by Defendant would not necessarily be sufficient to find excludable time. The facts of Frey are quite dissimilar to those of the present case. In Frey, the district court made no findings under section 3161(h)(8)(A) until after defendant's trial. Because the district judge did not notice that the trial date violated the Speedy Trial Act, the Ninth Circuit found the trial court could not have granted the delay based on the required findings under the Act. Therefore, it rejected the district court's nunc pro tunc findings of excluded time.

[4] On August 21, 1995, Defendant filed a motion for a bill of particulars and for discovery, which the Court heard on September 11, 1995. Therefore, under section 3161(h)(1)(F) of the Act, the period from August 21, 1995 to September 11, 1995 is also properly excluded on this ground. Sept. 28, 1995 Order ¶ 11.

pending motions. The Court advised counsel that it had a trial set shortly before the October 3, 1995 trial date in this case, and therefore the Court anticipated this case would be in trailing status. RT Sept. 11, 1995 at 31:23-32:10. The parties informed the Court of the following problems in the event the case trailed too long: (1) government counsel was scheduled to begin a three week trial on October 17, 1995, and thus would be unable to begin trial in this case until November 6, 1995; (2) a government witness would be unavailable at some point in late October; and (3) defense counsel was going to be unavailable due to a "prepaid, irreplaceable, irreparable" situation with his spouse from October 22 to 29, 1995. Id. at 32:11-23.

On September 28, 1995, the Court signed the parties' stipulation and proposed order. The Order explained:

> Since the September 11, 1995, hearing, the government has confirmed that one essential governmental witness will be unavailable for trial from October 10 to 24, 1995, because she is getting married and will thereafter be on her honeymoon. Another essential government witness will be on a pre-paid cruise from October 18-28, 1995, and thus will be unavailable for trial.
>
> From October 22 to 29, 1995, and November 22 to 27, 1995, defense counsel will be unavailable for trial as he will be out of town.

> Government counsel remains scheduled to begin a trial anticipated to last three weeks on October 17, 1995.
>
> Based on these scheduling conflicts, the parties request a continuance of the trial date from October 3, 1995, to November 28, 1995.

Sept. 28, 1995 Order ¶¶ 7-10. The period of time between October 10 and October 28, 1995 was deemed excludable because two essential witnesses for the government would be unavailable. Id. ¶ 12. The Court excluded the time between and including October 17, 1995 and November 6, 1995, and November 22 and November 27, 1995, because "government and/or defense counsel" would not be available for trial. Id. ¶ 13. Last, the Court held the "ends of justice served by granting the continuance outweigh the interest of the public and defendant in a speedy trial." Id. ¶ 14.

Defendant disputes the Court's findings that the period from October 10 and October 28, 1995, is excludable because two essential witnesses for the government were unavailable. Id. ¶ 12.[5] Section

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[5] The essential witnesses are Pam Spurlock (formerly Smith) and Anne Burke.

Ms. Spurlock intended to go on her honeymoon from October 10 through October 24, 1995. Sept. 28, 1995 Order ¶ 7. She is an employee of Home Savings of America, in which Defendant accumulated over $300,000. Ms. Spurlock will testify at trial that the Defendant regularly made large dollar amount deposits with the Bank. Opp. at 15:2-16:7.

3162(a)(2) of the Act automatically excludes a "delay resulting from the absence or unavailability of . . . an essential witness." Section 3162(a)(2) provides the "Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3)." Defendant contends the Government failed in carrying its burden of demonstrating these witnesses were unavailable and essential.

The Government responds by noting Defendant stipulated to the Court's findings concerning the necessity and unavailability of these witnesses. When parties enter into stipulations as to material facts, those facts will be deemed to be conclusively proven. United States v. Houston, 547 F.2d 104, 107 (9th Cir. 1976). However, as Defendant points out, whether a witness is essential and unavailable is an issue of law, to which the parties cannot stipulate.[6] Yet, this

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Ms. Burke intended to be on a pre-paid cruise from October 18, through October 28, 1995. Sept. 28, 1995 Order ¶ 7. She is central to the Government's case because she prepared the tax returns at issue. She will testify about numerous admission by the Defendant about the source of his income and his finances. Opp. at 16:8-17:2.

[6] Concerning availability of essential witnesses, the Speedy Trial Act states:

> For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and,

failing on the part of the stipulation does not disturb the Court's findings.

The Court found the disputed time period excludable based not only on the Government's representations to it, but also on the representations of the Defendant. The Court relies on the parties to apprise it of the facts underlying the necessity or unavailability of witnesses. Based upon the information provided to the Court by both parties, the Court relied on the parties' stipulation and found the period from October 10 through October 28, 1995, to be excludable.[7]

> in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes, os such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

18 U.S.C. § 3161(3)(B).

[7] At least one court has deemed a witness unavailable due to vacation plans. In United States v. Meyer, 803 F.2d 246 (6th Cir. 1986), the Sixth Circuit found a DEA agent who had expended non-refundable money as part of wedding and honeymoon plans was "unavailable under 18 U.S.C. § 31661(h)(3)(A), and that the 'ends of justice were best served by granting a continuance." Id. at 247-48. As in the present case, the parties agreed that the DEA agent was an essential witness. Id. at

This situation is quite different than that prohibited by the Ninth Circuit in United States v. Berberian, 851 F.2d 236 (9th Cir. 1988). In Berberian, the court held a defendant cannot "stipulate to a waiver of the protections of the Speedy Trial Act." Id. at 239 (citing United States v. Pringle, 751 F.2d 419, 433-34 (1st Cir. 1984)). In this case, Defendant has not stipulated to a waiver of his Speedy Trial rights. Had he done that, there would have been no need for the Court to issue findings in accordance with § 3161(h)(8)(A). Rather, Defendant stipulated to the findings required by this Court in determining excludable time. Based upon the parties representations, the Court made findings that this time should be excluded under the Act.[8]

Furthermore, both the Government and Defendant sought a continuance from October 3, 1995 to November 28, 1995 based on scheduling conflicts. Sept. 28, 1995 Order ¶ 10. See United States v. Rush, 738 F.2d 497, 508 (9th Cir. 1984) ("although defendants do not bear the primary responsibility for alerting the court to speedy trial deadlines, this does not mean that they may deliberately obtain an (h)(8) continuance for their own convenience . . . and then later claim that the court abused

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247.

[8] The present case is different from both United States v. Aviles-Alvarez, 868 F.2d 1108 (9th Cir. 1989) and United States v. Frey, 735 F.2d 350 (9th Cir. 1984), cited by Defendant. In those cases, the trial courts made no findings under § 3161(h)(8)(A).

its discretion in granting the requested continuance").

6. November 28, 1995 to December 5, 1995

The Court on its own motion continued the trial for one week from November 28, 1995 to December 4, 1995 because of a calendar conflict with another criminal trial. November 7, 1995 Minute Order. The Government agrees with Defendant this seven day period is not excludable under the Act. Opp. at 19:15-17. See 18 U.S.C. § 3161(h)(8)(C).

7. December 5, 1995 to April 16, 1996

The parties agree that the period of time from December 5, 1995 to April 16, 1996 is excludable under the Act because defendant was unable to proceed to trial due to his health. Motion at 8:17-19; Opp. at 19:19-22.[9]

8. April 16, 1996 to June 11, 1996

On April 23, 1996, the Court issued an order continuing the trial date to its present date of June 11, 1996. The Court held the ends of justice served by granting the continuance outweigh the interest of

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[9] It is important to note that while eighteen months have elapsed from Defendant's arraignment to his trial date, approximately 283 days of this period are directly attributable to Defendant's requests. Therefore, over half of the delay involved in this matter is neither at issue, nor disputed by Defendant in his motion.

the public and defendant in a speedy trial. April 23, 1995 Order at 3:6-8. Excludable time was found for multiple reasons.

The Court held the period of time between and including April 11, 1996, and June 11, 1996 to be excluded under section 3161(h)(3)(A) because an essential government witness, Connie Hansen, was to undergo serious surgery on April 11, 1996, and would require six to eight weeks to recuperate. Id. ¶ a.

The Court held the period between and including April 16, 1996 and June 3, 1996 excluded because the Defendant had requested the audit information to be obtained for the potential jurors pursuant to 26 U.S.C. § 6103(h)(5). Id. ¶ e. According to the IRS, six weeks was required to obtain this information. Id.

The Court held the period between and including May 2, 1996 and June 3, 1996 excluded because the government counsel would be out of town for her wedding and honeymoon. Id. ¶ c. Furthermore, the Court found it appropriate to give government counsel a week to prepare for trial when she got back from her honeymoon. Id.

The Court held the period between and including May 6, 1996 to May 14, 1996 excluded because defense counsel would be unavailable for trial during this time. Id. ¶ d. This continuance guaranteed Defendant continuity of counsel. Id.

The Court held the period between and including June 1, 1996 and June 10, 1996 excluded because Special Agent Charles Richardson, an essential government

witness, would be unavailable due to pre-paid vacation plans. Id. ¶ b.

a. Testimony of Connie Hansen

Because Government witness, Connie Hansen, was to undergo surgery on April 11, 1996, and would require six to eight weeks to recuperate, the Court held the period of time between and including April 11, 1996, and June 11, 1996 to be excluded under section 3161(h)(3)(A). Id. ¶ a. Defendants now dispute the Court's findings concerning her unavailability and essential testimony.

Defendant referred to Ms. Hansen as a "critical" witness. RT at 27:22-24. The Government, however, was willing to go to trial without her testimony. RT 14:20-25. The Government's position concerning her testimony does not alter the Court's findings that she is essential, because it is the Court that makes this ultimate determination. Furthermore, the legislative history of the Speedy Trial Act indicates that the Government "need not demonstrate impossibility of conviction without the witness before that witness may be deemed 'essential.'" United States v. Hamilton, 46 F.3d 271, 277 (3rd Cir. 1995).

b. Ends of Justice

Regardless of Ms. Hansen's testimony, the Court also held the ends of justice served by granting the continuance outweighed the interest of the public and defendant in a speedy trial. April 23, 1995 Order at 3:6-8. In doing so, the Court relied upon the representation of both parties at the April 4, 1996 status conference. Defense counsel agreed and

stipulated to the Court's findings. RT at 41:8.

As mentioned before, Defendant cannot waive the right to a speedy trial. United States v. Berberian, 851 F.3d 236, 239 (9th Cir. 1988) (citing United States v. Pringle, 751 F.2d 419, 433-34 (1st Cir. 1984). However, at the same time, Defendant may not stipulate to certain findings and then later seek to attack a court's findings concerning excludable time based upon such stipulations. Defendant always stipulated to the continuance, never once challenging the Government's position or the Court's reasoning.[10]

In United States v. Gallardo, 773 F.2d 1496 (9th Cir. 1985), the trial court made all the required findings necessary to grant three "ends of justice" continuances based upon representations made by the parties in their stipulations. Id. at 1506. In affirming the district court's decision to exclude time based on the parties' stipulations, the Ninth Circuit explained the difference between waiver and a defendant's stipulation:

> There is a significant difference between a defendant's having "waived" his rights under the [Act], which implies that the court did not undertake to determine independently whether the [Act's] requirements were

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[10] Only one party to this case ever objected to a continuance. The Government objected to Defendant's request for a continuance due to the unavailability of Defendant's summary tax witness. Opp. at 20:5-8.

> satisfied before it granted the continuance, and the situation in the present case, where the court relied upon the representations of [defendant's] counsel, but then performed a full-scale "ends of justice" analysis under the [Act] before granting the continuances.

Id. at 1506 n.14. As in Gallardo, this Court relied upon the stipulated representations of the parties, both oral and written. Based upon these mutual representations, the Court found disputed time periods to be properly excluded under the Speedy Trial Act. "Defense counsel may not simultaneously use the Act as a sword and shield." United States v. Pringle, 751 F.2d 419, 434 (1st Cir. 1984).

DATED:

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GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

SPEEDY TRIAL ACT
18 U.S.C. § 3161 et seq.

§ 3161 Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impracticable. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect

to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty-days, and for the third such period such time with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from the trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant

to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with

that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney

for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(9) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly--

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in case of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).